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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| JANET MASSOUD et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>ERNIE GOLDBERGER & CO.,<br><br>Defendant and Respondent. | B206781<br><br>(Los Angeles County<br>Super. Ct. No. BC364061) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Reversed.

Uriarte & Wood, Robert G. Uriarte and Abby A. Wood for Plaintiffs and Appellants.

Neufeld Law Group, Timothy L. Neufeld and John M. Kennedy for Defendant and Respondent.

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Two sisters and a brother own real property as tenants in common. A judgment was entered against the brother over 10 years ago. After the judgment against the brother, only the sisters paid the mortgage and other expenses in connection with the property. The brother's judgment creditor desired to force a sale of the property to enforce its judgment lien against the brother's interest in the property. The sisters brought the instant action to quiet title and for declaratory relief, seeking to impose an equitable lien in their favor on the property to enforce their right to reimbursement and contribution from their brother. The trial court entered summary judgment in favor of the judgment creditor on the ground that an *intent* to create a security interest in the property is required to establish an equitable lien, and no such intent existed here.

We reverse the judgment because the element of intent is not required to establish an equitable lien by subrogation, and the judgment cannot be upheld on any alternate ground raised in the summary judgment motion.

## BACKGROUND

From 1973 to the present, plaintiffs Janet Massoud, Mary Massoud, and their brother, defendant Elias Massoud, resided together in a home in Los Angeles (the property).[1] By 1989, Elias owned a one-third interest in the property, which interest he retains today. In 1990, title to the property was held by Elias, Janet and Josephine Massoud, a deceased sister. In 1990, Elias borrowed $384,750 from Bank of America and pledged the property as collateral. Elias, Janet, and Josephine executed a note and deed of trust, recorded in October 1990, pledging the property as security for the loan,

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[1] Although Elias Massoud (Elias) was a defendant, in his answer, Elias admitted the material allegations of the complaint and expressly requested that the court impose on his interest in the property an equitable lien in favor of plaintiffs which is superior to the judgment lien of defendant Ernie Goldberger & Co. Elias did not appeal from the judgment.

Without intending any disrespect, for convenience we refer to plaintiffs and their family members by their first names.

payable in monthly installments until November 2020. After a series of conveyances and the death of their sister Josephine in August 2000, Janet and Mary together now own a two-thirds interest in the property.

From October 2001 to January 2007, by checks drawn on each of their accounts, plaintiffs began making all payments on the Bank of America loan, approximately $2,500 per month. Plaintiffs made other payments for the upkeep of the property beginning in 1998.

Meanwhile, in 1996, defendant Ernie Goldberger & Co. (Goldberger) obtained a state court judgment against Elias for $516,300 in a lawsuit arising out of Elias's sales of diamonds owned by Goldberger. A week after the judgment in favor of Goldberger was rendered, Elias deeded his interest in the property to his wife for no consideration. Goldberger brought a second lawsuit in state court against Elias and others to set aside the fraudulent conveyance of the property, but about three months after the suit was filed, Elias filed for bankruptcy protection. The bankruptcy court refused to discharge Elias's debt to Goldberger, finding that Elias transferred the property with the intend to defraud, delay, and hinder the enforcement of Goldberger's judgment.

After Elias's appeal of the bankruptcy court's decision was dismissed for failure to prosecute, Goldberger's state court fraudulent conveyance action was tried and resulted in a judgment in Goldberger's favor for approximately $616,300 in August 2000. The judgment included the $516,300 in damages from the first action in 1996 plus $100,000 in punitive damages. The judgment in the second action was affirmed on appeal in 2001.

In January 2002, Goldberger recorded its second judgment against Elias. Goldberger began efforts to enforce its judgment, filing an application for an order for the sale Elias's interest in the property in September 2006. By December 2006, the interest accruing on the judgment had increased the amount owing on the judgment to over $980,000. On December 28, 2006, Goldberger withdrew its application requesting a sale of Elias's interest in the property.

On December 29, 2006, plaintiffs filed the instant complaint against Goldberger and Elias for quiet title, declaratory relief, and injunctive relief. The cause of action for

quiet title asserted an equitable lien with priority over Goldberger's judgment lien "equal to all funds expended by Plaintiffs to maintain the [Bank of America] Mortgage in good standing, plus all payments made by Plaintiffs for the benefit of Elias Massoud for the upkeep of the [property]." Plaintiffs alleged that "[i]t is imperative that [they] obtain a determination [of] the amount and priority of their equitable lien in that if said equitable lien is superior and prior in right to the judgment lien of [Goldberger], then any proposed sale of the [property] will not generate proceeds in excess of [Elias's] homestead exemption in the [property], and a sale of the [property] cannot take place."[2]

In February 2007, Goldberger filed a verified answer to the complaint, denying that it was currently attempting to sell the property to satisfy its judgment lien and averring that it had withdrawn its application for sale of the property in December 2006. After answering the complaint, Goldberger moved for summary judgment on three grounds: (1) Plaintiffs were not entitled to an equitable lien because they did not *intend* to create a security interest in the property; (2) even if they were entitled to an equitable lien, it was unenforceable against Goldberger because there was no notice to Goldberger and Goldberger's judgment lien took priority; and (3) the claim for an equitable lien is barred by the four- and five-year statutes of limitation under Code of Civil Procedure sections 343 and 319.[3] In support of the motion, Goldberger submitted, among other

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[2] According to Goldberger, the fair market value of the property in June 2005 was $1.3 million.

[3] Code of Civil Procedure section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Code of Civil Procedure section 319 provides: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises
*(footnote continued on next page)*

evidence, the third person judgment debtor examination of Janet, who testified in February 2007 that she did not expect Elias to pay her back for the expenses she had advanced on his behalf. According to Janet, Elias's health was "so-so," and he was not capable of working.

After a hearing, the court determined that no material fact was disputed and granted the summary judgment motion on the ground that plaintiffs could not establish an equitable lien on the property. The court's order granting the motion reasoned that "[t]he entirety of Plaintiffs' action depends on whether the facts establish their right to an equitable lien which is superior to Goldberger's judgment lien. However, an equitable lien can only be imposed where the parties intended to create a security interest in the property. *See Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 598. Goldberger, in support of its Motion, proffered evidence establishing that Plaintiffs did not expect their brother, [Elias], to repay them for funds they expended on the property on his behalf. . . . This evidence is undisputed by Plaintiffs. . . . Therefore, there can be no equitable lien. [¶] Additionally, an equitable lien may be found in order to prevent unjust enrichment. Plaintiffs have failed to allege that [Elias] would be unjustly enriched by not granting them an equitable lien."

Plaintiffs appealed from the judgment.

## DISCUSSION

We review a summary judgment ruling de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) """As a corollary of the de novo review standard, the appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in

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*(footnote continued from previous page)*

in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

the trial court. . . ." [Citation.]' [Citations.]" (*Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1483.) The burden of persuasion remains with the party moving for summary judgment. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1002–1003.)

We agree with plaintiffs that the element of intent is not required for a tenant in common to assert an equitable lien by subrogation against a nonpaying tenant in common.

"As an incident to cotenancy relationship either cotenant has a right to demand of the other an accounting as to rents and profits of the cotenancy, which, of course, involves the right of one cotenant to have refunded to him by the other his proportion of any expenditures made for the benefit of the common property. The right to this accounting as to rents and profits inures to either cotenant as soon as the other has collected them, and the right to demand a proportionate share and maintain an action therefor on refusal to pay it then arises. So, also, as to the right of contribution. The right of the cotenant making the payment in excess of his proportion to recover payment from the other cotenant, his share thereof, arises at the date when any such expenditure is made." (*Willmon v. Koyer* (1914) 168 Cal. 369, 372–373 (*Willmon*).)

"[N]o matter whether one tenant paying it intended the payment to be for his own benefit or not, such payment in fact and in law essentially inures to the benefit of the other cotenants." (*Conley v. Sharpe* (1943) 58 Cal.App.2d 145, 156 (*Conley*).) Thus, the right to contribution arises "independent of any intention" of the cotenant paying an expense for the benefit of the property, and "as all other co-tenants are entitled to the benefit of such payment, it is only right that they should refund to the one making it their proportion of the amount he has paid." (*Ibid*.) The right of contribution also arises independently of the intent of the nonpaying cotenant; it "cannot be taken away from the cotenant who makes the payment . . . accruing under the mortgage, by any act or declaration of the defaulting [cotenant] in the absence, at least, of an agreement to the contrary." (*Jamison v. Cotton* (1933) 136 Cal.App. 127, 131 (*Jamison*).)

"'The liability of cotenants, as between themselves, for the payment of liens against the common estate, is proportionate to their respective interests, and a cotenant relieving the common property from a lien or charge for the joint benefit of the tenants in common is entitled to an equitable lien by subrogation. [Citation.] For purposes of subrogation the paying cotenant is not deemed primarily, but only secondarily, liable for his cotenant's proportion of the debt. [Citation.]' [Citations.]" (*Snider v. Basinger* (1976) 61 Cal.App.3d 819, 823–824 (*Snider*).) Because the paying tenants in common seeking subrogation are secondarily liable, they are not mere volunteers or intermeddlers, but are acting to protect their own interests. (See *Katsivalis v. Serrano Reconveyance Co*. (1977) 70 Cal.App.3d 200, 210; *Shaffer v. McCloskey* (1894) 101 Cal. 576, 580.)

Based on the foregoing authorities, we conclude that the trial court erred in determining that a tenant in common must show intent to establish an equitable lien by subrogation.

The following authorities cited by Goldberger are inapposite as they do not deal with the right of a tenant in common to an equitable lien by subrogation: *Isaac v. City of Los Angeles*, *supra*, 66 Cal.App.4th 586, 601–602 (municipality's attempt to create a priority utility lien on residential property on account of delinquent utility bills was invalid); *Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 509–510 (plaintiff who loaned money to construct house, but had no trust deed or other security instrument, did not have a security interest or equitable lien on the property); *Clayton Development Co. v. Falvey* (1988) 206 Cal.App.3d 438, 443–444 (equitable mortgage created when trust deed contained faulty description of encumbered property and parties intended to create security interest in property); *Kaiser Industries Corp. v. Taylor* (1971) 17 Cal.App.3d 346, 352 (creditor's remedy restricted to foreclosure because letter of instructions to title company was sufficient to constitute an equitable mortgage); *Lentz v. Lentz* (1968) 267 Cal.App.2d 891, 894–895 (summary judgment reversed because of triable issues as to whether decedent intended the primary security for a debt to be an insurance policy or real property); *Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Assn*. (1966) 247 Cal.App.2d 1, 10 (general contractor did not plead basis for an equitable lien

on construction loan proceeds because of absence of allegations that it supplied labor or materials to the project or that it justifiably relied on receiving construction loan proceeds); *McColgan v. Bank of California Assn*. (1929) 208 Cal. 329, 336–338 (contract between property owner and his agent evidenced intent that agent would have an equitable lien on property to secure payment for amounts advanced by agent on behalf of owner).

Goldberger faults plaintiffs for failing to present evidence of the *source* of the funds used to pay Bank of America, arguing that their assertion of an equitable lien is "highly suspect" absent such a showing. But the evidence in the record shows that the Bank of America loan was paid with funds from plaintiffs' respective checking accounts, and Goldberger does not offer any legal authority to support the proposition that they were required to trace the origin of the funds in their checking accounts.

In a related argument, Goldberger argues that plaintiffs were required to plead and establish that Elias would be unjustly enriched without imposition of an equitable lien. But Goldberger does not cite any pertinent authority to support this proposition. And the principles articulated in *Willmon*, *Conley*, *Jamison* and *Snider* governing the right of a tenant in common to an equitable lien already take into account considerations of unjust enrichment.

For all of the foregoing reasons, summary judgment was improperly granted on the theory that plaintiffs were required to show intent and unjust enrichment in order to establish an equitable lien.

We cannot affirm summary judgment on the issue of priority because Goldberger fails to cite pertinent authority or evidence establishing that its judgment lien would take priority over an equitable lien of plaintiffs. On this point, Goldberger argues that "the earliest point in time that [plaintiffs] could possibly have created a lien by their conduct was 1998, the first point in time when they claim to have started advancing monies on [Elias's] behalf," but 1998 was "too late" because in 1996 Goldberger already had a judgment entered against Elias, and thus a superior claim to Elias's one-third interest in the property.

Although Goldberger had a judgment in 1996, the record shows that it did not create a *judgment lien* until 2002, when its judgment was recorded. "[A] judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder." (Code Civ. Proc., § 697.310, subd. (a).) Thus, a judgment lien attaches to a homestead when the abstract of judgment is recorded. (*Smith v. James A. Merrill, Inc*. (1998) 64 Cal.App.4th 94, 101.)

We also reject Goldberger's assertion that plaintiffs cannot enforce a lien without providing Goldberger notice. "It is well settled that where a creditor seeks by judicial process to attach the property of his debtor to satisfy the debt, he acquires only the interest which the debtor actually possesses. Such an attaching creditor is in the position of a purchaser with notice, and it has been held that his lien is subject to any infirmities which exist in the title of his debtor. [Citations.] Thus, the claim of an attaching creditor may be defeated by proof of even an equitable assignment of the debtor's interest . . . ." (*Kinnison v. Guaranty Liquidating Corp*. (1941) 18 Cal.2d 256, 263–264.) "An attachment or judgment is a lien only on the interest of the judgment debtor. Latent equities against the debtor, such as arise upon a resulting trust, may be asserted against his attachment or judgment creditor, who as to such equities does not have the status of a *bona fide* purchaser." (*McGee v. Allen* (1936) 7 Cal.2d 468, 473; *Wheeler v. Trefftzs* (1964) 228 Cal.App.2d 271, 274 [judgment creditor's lien subject to latent equities asserted against debtor].) A judgment creditor thus does not have the status of a bona fide purchaser, but of a purchaser with notice. As a judgment creditor in Goldberger's situation is treated as a purchaser *with notice*, plaintiffs' failure to give notice would not preclude them from enforcing an equitable lien.

Nor can the summary judgment be upheld on the ground that plaintiffs' action is barred by the four-year and five-year statutes of limitation of Code of Civil Procedure sections 343 and 319. (See fn. 3, *ante*.) Goldberger fails to provide pertinent authority that the foregoing statutes govern the causes of action for quiet title and declaratory relief.

No statute of limitations runs against a plaintiff seeking to quiet title while he is in possession of the property. (*Muktarian v. Barmby* (1965) 63 Cal.2d 558, 560; *Mayer v. L&B Real Estate* (2008) 43 Cal.4th 1231, 1237 ["It long has been the law that whether a statute of limitations bars an action to quiet title may turn on whether the plaintiff is in undisturbed possession of the land"].) "In many instances one in possession would not know of dormant adverse claims of persons not in possession. [Citation.] Moreover, even if, as here, the party in possession knows of such a potential claimant, there is no reason to put him to the expense and inconvenience of litigation until such a claim is pressed against him." (*Muktarian*, *supra*, 63 Cal.2d at pp. 560–561; see also *Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1228 [statute of limitations for an action to quiet title does not begin to run until someone presses an adverse claim against the person holding the property].)

Under the foregoing principles, the statute of limitations did not begin to run on plaintiffs' quiet title action until Goldberger filed its application for an order for a sale of Elias's interest in the property in September 2006. The complaint filed in December 2006 was thus timely.

Goldberger also fails to establish that the declaratory relief cause of action was barred by the statute of limitations. "'[I]f declaratory relief is sought "before there has been a breach of the obligation in respect to which said declaration is sought," or within the statutory period after the breach, the right to such relief is not barred by lapse of time. (Citations.) There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations. Quiet title actions, forerunners of declaratory actions, may be maintained when an adverse claim to property is asserted, but the period of limitations does not commence to run at that date.'" (*Martin v. Henderson* (1953) 40 Cal.2d 583, 593.)

Here, Goldberger pressed its adverse claim to Elias's interest in the property in September 2006. Plaintiffs filed their action in December 2006. Accordingly, even if a four- or five-year statute of limitations applied and began to run in September 2006, the declaratory relief claim filed in December 2006 would have been timely.

For all of the foregoing reasons, the judgment cannot be upheld on grounds raised in the summary judgment motion but not ruled upon by the trial court.

**DISPOSITION**

The summary judgment is reversed. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.